D'CRUZ STELLA

v.

MOSBERT BHD.

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[ORIGINATING SUMMONS NO. 347 OF 1983]
19 MARCH 1984

LAND LAW: *Private caveat - Whole land - Claim in respect of a portion of the land - Whether an irregularity which can be cured - Foreign address in caveat - Whether a fatal defect.*

COMPANY LAW: *Liquidation - Leave to bring an action against it - Filing of proof of debt by creditor - Whether extinguishes claim for specific performance for sale of land.*

The respondent made an application to set aside an order whereby the applicant was granted leave in an *ex-parte* application to bring an action against the respondent to enforce a contract for the sale of a portion of land. The respondent company was in liquidation and the liquidator entered in an agreement for the sale of the said property to a third party. The applicant caveated the whole land and gave a foreign address in her caveat. The applicant had filed a proof of debt with the liquidator.

Held:

[1] The foreign address was not a fatal defect in the caveat.

[2] The applicant could affirm a statutory declaration that her claim was limited to a portion of the land.

[3] The mere filing of a proof of debt by the applicant with the liquidator did not extinguish her claim for specific performance of an agreement for the sale of land.

[4] The *ex-parte* application by the applicant for leave to bring an action against the respondent was an irregularity which could be cured.

[Application dismissed with costs.]

Cases referred to:

Murray and Murray v. United Pacific Transport Pty. Ltd. [1960] QLR 27
Re Testro Bros. Consolidated Ltd. [1965] VR 18
Re Sydney Formworks Pty. Ltd (In Liquidation) [1965] 82 WN 558
Thames Plate Glass Company v. Land and Sea Telegraph Co. [1981] 6 Ch App 643
Wyley v. Exhall Coal Mining Co. [1864] 33 Beav 538
Zeno Ltd. v. Prefabricated Construction Co. (M) Ltd. & Anor. [1967] 2 MLJ 104
Tan Thean Choo v. Cheah Kia Seong & Anor. [1977] 1 MLJ 106
N. Vengadasalam v. Mahadevan & Anor. [1976] 2 MLJ 161

Legislation referred to:

Companies Act 1965, s. 226(3)
National Land Code 1965, s. 417(2)
Rules of the High Court 1980, O. 2 r. 1

Other source referred to:

Palmer's, Company Law, 21st Edn., p. 765

For the plaintiff - George Puthucheary; M/s. George Puthucheary & Co.
For the liquidator - C.K.G. Pillay; M/s. Hassan Yunos & Co.

JUDGMENT

Mahadev Shankar J:

This is yet another matter concerning the enforcement of a claim to some 6,000 square feet of land described as Private Lot No. 460 in Taman Chendrakaseh in which Mosbert Berhad (In Liquidation) is the defendant.

There are some minor differences in the facts which makes it desirable that a judgment be given in this matter even though the main issues have already been disposed off in the judgment I gave in OS 319 of 1983 between Chatib bin Kari and the defendant.

D'Cruz Stella (Stella) the applicant in this case entered into a similar agreement to purchase her lot No. 460 on 10 April 1967. She had paid in full for the said lot in monthly instalments over a period of 5 years.

She apparently had some problems in getting a transfer of the said lot to her and instructed solicitors to pursue the matter further with Mosbert Bhd. Mosbert Bhd. appears to have taken the position that since the government had gazetted the land for the purpose of acquisition they could not obtain final approval of the sub-division of the said land and offered to refund the purchase price to Stella.

But apparently she never did receive the money.

After the winding-up order was made it appears that Stella filed a proof of debt and general proxy form with the Official Assignee who was appointed Official Receiver and Liquidator of Mosbert Bhd. but these documents were not in evidence before me.

The Liquidator gave her no satisfaction.

As I have observed elsewhere he entered into an agreement in writing for the sale of the said land on 1 April 1981 with Jet Age Construction Sdn. Bhd.

I was informed by Mr. George Puthucheary who appeared as Stella's Counsel that the plan submitted in 1968 for the sub-division of the said land was in fact approved in 1982 by the authorities concerned and that the sub-division plan is the same plan showing the private lots which is attached to the agreement which the plaintiff is seeking to enforce.

If this information is correct, and it was not challenged by Mr. Pillay, Counsel for the defendant and for Jet Age, why was it not earlier disclosed to this Court by or on behalf of the defendants.

Why is it being contended again in this matter that these private lots are so incapable of being identified that the plaintiffs' claims in these actions must fail for uncertainty?

These are matters which can be dealt with at the appropriate time but to continue with the salient facts in so far as they are relevant to the present judgment, it is pertinent to add that on 24 April 1982 Stella applied for a private caveat to be entered against the said land in Form 19B of the National Land Code. In her application for entry of the private caveat she gave her Singapore address.

She stated that the ground of her claim to the said land was that she had entered into an agreement dated 10 April 1967 with Syarikat Mosbert for the purchase of private lot No. 460 in the said land. The attestation clause to the application was executed by FJ Puthucheary an advocate and solicitor who needs no introduction to his peers in Johore Bahru. This caveat was registered on 12 May 1982.

It is important to note that in the Schedule to the caveat she requested for the whole of the said land comprised in Johore Grant No. 72 for Lot No. 83 in the Mukim of Plentong to be caveated even though her claim was only to an area of some 6,000 square feet comprised in the Private lot No. 460.

On 17 April 1983 the defendants caused to be issued a notice for the removal of this caveat in accordance with Form 19C of the National Land Code. A copy of this notice was extended by the Registrar to M/s. Suppiah & Singh.

The notice itself was only served to Stella by AR Registered post on 17 August 1983.

It required her to obtain a Court order for its extension within one month from the date of the service of the notice upon her, failing which the caveat would be cancelled.

She accordingly instructed her solicitors to move and Mr. George Puthucheary did on 8 September 1983 file an *ex parte* originating summons in this Court for several orders along the same lines as those prayed for in Chatib bin Kari's originating summons.

The matter came before me on 10 September 1983 and I ordered that leave be granted to commence proceedings against Mosbert Bhd. (In Liquidation) and that the caveat remain in force until the Civil Suit filed in respect of her claim is disposed of, such Civil Suit to be filed within 3 months of the date of the Order and that a copy of the Order be served on the Registrar of Titles, Johore and also be served on the Official Receiver and Liquidator of Mosbert Bhd. (In Liquidation) within 2 weeks and that the liquidators shall be at liberty to apply to the Court as to the terms, if any, to be imposed upon Stella for the continuation of the action.

M/s. Suppiah & Singh on behalf of the Official Receiver and Liquidator filed the summons-in-chambers on 2 November 1983 to have my order set aside and for consequential directions and supported their applications with an affidavit by Mr. Wong Thiam Seng.

To this affidavit Stella filed an affidavit-in-reply on 20 November 1983.

After I made my order on 29 November 1983 in Chatib bin Kari's case I gave notice to all parties concerned that I would be delivering a written judgment setting out the reason for my orders in that matter and adjourned all the other applications including this one to be disposed off on a date to be fixed. After judgment was delivered on 7 February 1984 in Chatib's matter, Counsel for the defendant in the other matters requested for an adjournment to consider the implications of the judgment on the other matters.

Notwithstanding that an appeal is now pending against the judgment in Chatib's case and although the issues of law and fact are very similar, the defendants have nevertheless insisted that this matter be heard on the grounds that the differences of fact between this case and Chatib's case makes it imperative that I should set aside the order granting leave to Stella and should also further order that the caveat which she has filed is null and void.

The grounds upon which this application is being made are as follows.

Firstly, it is contended that the application for leave to commence proceedings against the defendant could never have been made on an *ex parte* application and that having done so the order which I made granting leave was void and should be set aside.

As regards the caveat it was said that the omission to give the address in Malaysia was a fatal defect in the caveat which invalidated it.

Further it was urged by Mr. Pillay on behalf of the defendant that Stella's action in caveating the whole of the said land invalidated her caveat because it was clear that her claim was restricted to only the 6,000 square feet comprised in Private Lot No. 460.

And finally it was urged that Stella's act in filing the proof of debt had the effect of wholly extinguishing her claim to specific performance. And that consequently it was not open to her to make anything other than a claim for the refund of her purchase monies in the liquidation.

As to the first point Mr. Pillay cited the case of *Western & Brazilian Telegraph Co. v. Bibby* [1880] by throwing at the head of the Court nothing more than a photo-copy of the extract of the case as it appears in the relevant volume of the English & Empire Digest.

It is a matter for the utmost regret that today 104 years later such highly technical points are still being raised in these Courts in the face of O. 2 r. 1 of the Rules of the High Court which should have left no one in any doubt that the modern trend is to proceed not on the basis of technicalities but on the merits.

I am grateful to Mr. George Puthucheary for his careful submission on the matter. As appears from the report of the case in [1880] XLII the Law Times pp. 821 at 822 the judgment is a one sentence statement of Jessel MR that it was not the usual practice to grant leave *ex parte* to commence an action against a Company in liquidation. No reasons were given and the facts of that case are not stated. Consequently I find that decision of little assistance to me. On the other hand Mr. Puthucheary cited several decisions which are more to the point.

In *Thomson & Anor. v. The Mulgoa Irrigation Co. Ltd. & Anor.* [1894] Bankruptcy Company and Probate Cases Vol. 4 p. 33 it was held by Manning J that notwithstanding that a suit is commenced against a company in liquidation without first obtaining the leave of the Court as required by the Company's Act 1874 the Court will, if good cause be shown on the merits, make an order granting leave *nunc pro tunc* (now for then). This decision was followed in *Murray and Murray v. United Pacific Transport Pty. Ltd.* [1960] QLR 27 and also applied for *Re Testro Bros. Consolidated Ltd.* [1965] VR 18 and also in *Re Sydney Formworks Pty. Ltd. (In Liquidation)* [1965] 82 WN 558.

In the last mentioned case McLennan CJ held that the failure to obtain leave to commence an action for damages did not give rise to a plea in bar and that the Equity Courts had jurisdiction to grant an order to continue the action *nunc pro tunc.*

In all these cases the guiding light as to whether leave should be granted is whether good cause has been shown by the applicant suggestive of some merits in his claim which makes it desirable that the matter should be adjudicated.

There is a plethora of material before me in the affidavits filed in this originating summons by both sides which makes it clear that this is a case which should go to trial.

But *ex abundante cautela* I would here record that if the correct legal position is that the order made on 10 September 1983 was invalid merely because the application was made *ex parte* then I hold that the omission was an irregularity in this case and do now hereby grant leave *nunc pro tunc* to take effect from that date.

Mr. George Puthucheary went further to submit that Stella was not in a strict legal sense a creditor of the company and that accordingly she did not require to apply for leave under s. 226(3) of the Companies Act 1965 nor was she entitled to file a proof of debt in the winding-up.

I hold that it is not necessary for me to decide this point. *Thames Plate Glass Company v. Land and Sea Telegraph Co.* [1981] 6 Ch App 643 is sufficient authority that leave will be given to proceed against the company if the plaintiff is seeking a remedy other than the money judgment such as an order of specific performance or an injunction. See also *Wyley v. Exhall Coal Mining Co.* [1864] 33 Beav 538.

I now turn to Mr. Pillay's submission that the giving of a Singapore address in her application for a caveat and the omission to give a local address was a fatal defect in the caveat. The case of *Zeno Ltd. v. Prefabricated Construction Co. (M) Ltd. & Anor.* [1967] 2 MLJ 104 was cited as authority for this proposition. I have read that case very carefully and I am unable to see how it supports this submission. Furthermore here is a case where the Registrar had no difficulty in reaching Stella by AR Registered Post and serving the notice of intended removal upon her. The failure to give a local address did not in any way prejudice either the Registrar or the defendants and I am unable to hold that this was a fatal defect. At the most it was an irregularity which did not in any way prejudice the defendant and it is a matter of regret that the defendants have seen fit to take such a point in this Court.

Next I will deal with the submission that because the caveat was said to relate to the whole of the said land it was null and void *ab initio* and that no action could be taken retrospectively to put the position right. Again no authority whatsoever was cited in support of such a sweeping statement.

Mr. George Puthucheary drew the attention of the Court to the case of *Tan Thean Choo v. Cheah Kia Seong & Anor*. [1977] 1 MLJ 106. There a person who claimed an interest in a specific portion of the land was held entitled to caveat the whole land provided that the effect of the caveat was to protect the particular interest claimed. The appellant in that case claimed to be entitled to a 2/11 share of the land and had started proceedings in respect thereto and her caveat was allowed to stand so as to maintain a *status quo* between the parties pending the determination of the suit. This is a Federal Court decision which is binding on me. I understand the necessity for the caveating of the whole of the land in that case to arise from the fact that the 2/11 share was an undivided 2/11 share in the whole of the land. In the case of *N. Vengadasalam v. Mahadevan & Anor.* [1976] 2 MLJ 161 which is also a Federal Court decision the Lord President Tun Suffian restored a caveat which had in the first instance been set aside by the High Court since it purported to caveat the whole of the land and when the claimant's interest was only to a limited portion thereto. He went so far as to provide the wording in which the caveat was to be expressed so that it was clearly limited to the claim of the caveator to that portion of the land claimed by him.

What is more s. 417(2) of the National Land Code clearly empowers the Court to provide any remedial orders required in accordance with the justice of the case.

I therefore hereby order purely to eliminate any uncertainty as to the portion claimed by Stella that she should affirm a further statutory declaration attaching thereto a copy of the agreement upon which she sues together with the attached plan and stating that her claim to the said land is restricted to that portion of the land shown on the plan as Private Lot No. 460 in the Agreement.

The last point taken by Mr. Pillay is that by filing a proof of debt Stella's claim for specific performance was extinguished. Once again no authorities were cited in support of this proposition. I am not prepared to hold that merely because a claimant has filed a proof of debt his entire claim is extinguished. Each case must depend upon its own circumstances. It is noted from *Palmer's Co. Law* (21st Edn.) at p. 765 that a secured creditor has several options open to him one of which is to realise his security and prove for the deficiency or alternatively to surrender his security and prove for the whole debt. The problem with this case is that Stella's claim is for specific performance and without a full hearing on the merits I am not prepared to hold that she was a secured creditor or had surrendered her right of action. The allegation that her claim has been extinguished is only one of the many defences which should go to trial.

In all the circumstances of this case I hold that the summons-in-chambers filed by the defendant to set aside my order granting leave should be dismissed with costs to be taxed and paid by the defendants.

I also order however that the suit which has been filed by Stella should be served on the defendant but that all further proceedings thereon should be stayed until the disposal of the appeal in Chatib bin Kari's matter.

The costs of the *ex parte* application for leave will be reserved and dealt with at the conclusion of the trial and there will be liberty to all parties to apply.

Also found at [1984] 2 CLJ 172